No. [illegible]

United States Circuit Court of Appeals

For the Ninth Circuit.

ALBERT J. GALEN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA

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CARL RASCH, Helena, Montana.
WILLIAM WALLACE, JR., New York.
L. O. EVANS, Butte, Montana.
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Attorneys for Plaintiff in Error.

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Attorneys for Plaintiff in Error.

Record Printing Co. Helena, Montana

STATEMENT.

This is a writ of error to the United States District Court for the District of Montana to review a judgment of that Court finding plaintiff in error guilty of contempt and imposing a fine of five hundred dollars. The following are the facts:

On Monday, January 15, 1917, the case of the United States v. A. M. Alderson, W. C. Rae and eight other defendants came on for trial in the United States District Court at Helena before Honorable George M. Bourquin and a jury. The defendants were charged with having unlawfully devised a scheme to defraud, and with having used the United States mails in furtherance of this scheme. They pleaded not guilty. Albert J. Galen (the plaintiff in error) and D. M. Kelly appeared as attorneys for the defendants Alderson and Rae. The trial was concluded twelve days later, on Saturday, January 27. As to three of the defendants the jury was directed to return a verdict of acquittal; as to the remaining seven the case was submitted to the jury under proper instructions. Two of the defendants were found guilty. The remaining five, including Alderson and Rae, were acquitted.

Five days later, on February 1, 1917, the United States attorney for the District filed an information charging that Galen and Kelly had committed a contempt of court during the progress of the trial (R. 1-7). So far as it concerned Galen, (for the writ to review the conviction of Mr. Kelly was sued out and

is presented independently), the information charged the three following distinct over acts:

1. That during the adjournment of the Court from the 23rd day of January to the 24th day of January, in the barroom of the Placer Hotel, in the City of Helena, Galen did visit and converse with one W. B. Warner, one of the jurors empanelled and sworn to try the case, with a view on the part of Galen improperly to influence the actions of Warner in his deliberations.

2. That Galen did then and there furnish liquid refreshments to Warner. knowing him to be a juror in said case and did himself partake of and drink liquid refreshments in company with Warner.

3. That on the 24th day of January, during an adjournment of the court from January 24 to January 25 in the Placer Hotel in Helena, Galen did visit and converse with Warner and promise to introduce him to some of the members of the 15th Legislative Assembly of Montana, then in session in Helena, for the purpose of securing the aid and assistance and support of some of the said members in the passage of a certain bill in which Warner was interested.

The information containing these charges came on for hearing before Judge Borquin on a plea of not guilty February 7, 1917. The testimony concerning

Galen, like the charges in the information, related entirely to what took place between him and the juror Warner; and as the Court's decision must be controlled by a consideration of this testimony, we proceed to state its substance fully.

For the prosecution five witnesses were called to support the charge of misbehavior. These were (1) the juror Warner, (2) E. W. Byrne, a Special Agent of the Department of Justice, (3) Joe Kirschwing, a resident of Great Falls, Montana, who had been present throughout the trial of the Alderson case, (4) R. H. Adkinson, subpoenaed by the Government as a witness in the Alderson case, and (5) Louis A. Haven, a witness for the Government in the Alderson case. No one of the other witnesses sworn in the contempt proceedings implicated Galen in his testimony in any way.

1. The juror Warner testified that he resided at Deer Lodge, Montana (R. 97); that he was a man of family (R. 116), employed as a repairer of steel cars. He had never had a lawsuit, never served upon a jury previous to his service in the Alderson case, never even been in a court room (R. 115). He did not know Galen—saw him for the first time in the court room (R. 97). He was interested in a bill pending in the legislature and a member of the legislature had suggested to him that he talk with Galen and Kelly, who were ex-Attorneys General and that they

would introduce him (R. 97-98).* He talked with Galen about the bill two or three times at the utmost (R. 102). The only conversations he had with him were in the lobby of the Placer Hotel (R. 98). He did not drink with him (R. 100), nor did Galen introduce him to any member of the Legislature (R. 99, 129). His only talk with him was about the bill (R. 100) and he was not influenced in his decision of the Alderson case in any way by anything that was said to him by Galen (R. 130).

After the trial was over the witness was seated at luncheon with Mr. Lamb when he (Lamb) called Galen, Kelly and Judge Smith over to the same table with them (R. 109-111). Still later, when subpoenaed as a witness for the government in the contempt proceedings, witness had met and stopped Galen on the street and Galen had sent witness up to Mr. Mettler's office (R. 113).

2. E. W. BYRNE testified that on the evening of January 25 a fur auction was taking place in the lobby of the Placer Hotel. The juror Warner took a seat in the rear of the fur auctioneer (R. 49). Witness saw Galen about two or three feet from Warner, and it appeared to witness that Galen walked up to Warner (R. 95). Warner showed plaintiff in error a typewritten document and some

*Note—The bill in which the juror was interested was introduced in evidence (R. 126), and appears at pages 339 to 341 of the printed record.

slight conversation occurred. Galen then walked away. Witness did not know what the subject of conversation was (R. 49). There were a great many people standing around (R. 95).

*Note—The bill in which the juror was interested was introduced in evidence (R. 126), and appears at pages 339 to 341 of the printed record.

3. JOE KIRSCHWING testified that in the court room on Friday, January 26, during a recess, the juror Warner left his seat in the jury box and met Galen and whispered to him. Warner then walked out and Galen followed him and he (Kirschwing) afterwards saw Galen and Warner in conversation in the corridor, Galen having his arm around Warner's shoulders (R. 134-135).

4. R. H. ADKINSON testified that he was present at a conversation which took place between the United States Attorney and Warner in the lobby of the Placer Hotel; that in that conversation Warner first said that he did not talk to Galen and then go into the barroom and have a drink and that afterwards he admitted that he did (R. 141-142). The witness had noticed that the juror Warner was a little deaf (R. 145). His account of the conversation was that the United States Attorney had said "'Mr. Warner, I understand that you had a talk with Mr.

Galen, and afterwards went and took a drink with him in the bar.' He (Warner) said no, he did not, and Mr. Wheeler (the United States Attorney) mentioned it to him again and he admitted that he did." (R. 148). He was not surprised at the two contradictory statements (R. 150). Asked whether he thought that Warner's deafness prevented him from understanding the full question, he said he hardly thought so (R. 149).

5. LOUIS A. HAVEN testified that about six o'clock on the evening of the day the Government closed its case, in the lobby of the Placer Hotel, while Galen was standing near the steps in the lobby, the juror Warner went up to him and started talking to him. They were standing a few feet from the steps when they started to talk and then moved nearer the steps and then went over toward the barroom. He could not see from where he was sitting whether they went into the barroom, because a couple of large pillars prevented him and he could only tell the general direction in which they were going (R. 162-164). All this took place in the open lobby of the Placer Hotel. They were not whispering. The witness thought they talked about a minute and then went toward the corner of the steps and stopped there he thought about thirty second and

then went toward the entrance of the bar, which was also toward the street (R. 165). They might have been going to the basement to the toilet room, or into the barroom, or out through some entrance to the street. The posts shut off the witness' view (R. 167).

The foregoing gives fully the case against Galen as made by the prosecution; and it will be observed that it covers five distinct occasions—three during the progress of the trial and two after its conclusion—when Galen and the juror Warner spoke to each other. These, stated in their chronological order, are as follows:

1. The occasion covered by the testimony of Mr. Haven, occurring about six o'clock in in the evening of the day the Government closed its case (R. 162).

2. The occasion covered by the testimony of Mr. Byrne, occurring on the evening of Thursday, January 25, the night of the fur sale (R. 48). This was after both sides had rested and arguments to the jury had begun.

3. The occasion covered by the testimony of Mr. Kirschwing, occurring at the Court House in the afternoon of Friday, January 26 (R. 133).

4. The occasion of their lunching together after the jury had returned its verdict (R. 109-111).

5. The later occasion when, having been

subpoenaed as a witness for the Government in the contempt proceedings, Warner was met on the street by Galen and requested to go to Mr. Mettler's office (R. 113).

Testifying in his own behalf, Galen referred to five different occasions, during the progress of the Alderson trial, when he had spoken to Warner or Warner had spoken to him. These were as follows:

1. On the evening of some day between the 19th and the 23rd of January in the Placer Hotel, Galen was conversing with Alderson, one of the defendants, and Mr. Walker, an attorney from Butte. His attention being attracted in some manner by Mr. Walker, he had removed a few feet from Alderson when Warner entered the hotel, approached Alderson and started to speak to him. Galen thereupon approached Warner and said to him "Mr. Warner, I would rather you would not talk with Mr. Alderson. He is a defendant and you ought to appreciate the situation. Please do not do that." Warner said, "Is there any objection to talking to you?" Galen said "No, what is on your mind?" Warner said "Do I smell bad or have I got some disease that I cannot talk to anybody?" Galen said "No. Now what is it Warner?" They walked from that point to the balustrade of the steps and stopped. Warner said, "I am interested in a railroad men's

bill and I was wondering if you knew any railroad men in the House of Representatives. Galen said "Yes. Mr. Searles is a railroad man. I think he works for the Milwaukee." Nothing further was said and Galen immediately left the juror. He was uncertain as to where he (plaintiff in error) went or as to where the juror went, but he did not think that he Galen went into the Placer bar (R. 189-191). He was uncertain as to whether this conversation took place before or after supper. There was quite a crowd of people about (R. 192). He knew the witness Haven but did not see him on this occasion, though he might have been present (R. 196). This was the first time he ever spoke to the juror (R. 191).

2. In the court room the following morning the juror Warner in passing Galen stopped and said to him "After the call down you gave me last night, I hardly slept any. I should have known better." (R. 191).

3. On the night of January 25, in the Placer Hotel lobby an auction sale of furs was taking place. A difficulty had arisen, which resulted in the appearance of a constable, who, apparently, stopped the sale. Galen was standing in the lobby near the Clerk's desk when Mr. Diamond, the owner of the furs, sought to arrange with him to

appear in the Justice Court the next morning. Galen explained that he was engaged in the Alderson trial. As he started to leave, the juror Warner handed a paper or a roll of papers to him, saying "Look at that." Galen opened it and read the title, it being a bill providing that railroads should have cars in ill repair repaired within the State of Montana. Galen simply looked at the title, stating "I haven't got time to fool with that," and walked away (R. 193-194-195). He had not seen the juror at all until the paper was presented to him while he was talking to Mr. Diamond (R. 195).

4. One morning, which Galen believed was the morning after the night they first met in the Placer Hotel, Warner, while standing next to Mr. Wheeler (the United States Attorney) in the court room and speaking across the table, asked Galen the name of the man he (Galen) had mentioned to him and Galen answered "Searles." (R. 201).

5. On Friday, January 26, during the argument of Mr. Wheeler to the jury a recess was taken. After the jury had gone out, Galen, who was somewhat nervous as the result of the strain of the trial, got a cigarette from Mr. Alderson or Mr. Rae and walked into the corridor and stood smoking and looking down into the areaway or light well

along the land office. Many people, including the jurors, were around in the corridor. Galen paid no attention to who they were. As he was standing there smoking the juror Warner stepped up to him and said "I want to talk to you about my bill." Galen said "For Christ's sake, wait until this trial is over." Nothing further was said. Galen did not talk or whisper to Warner in the court room, nor did Warner talk or whisper to him before speaking to him in the hallway (R. 197). He did not have his arm around the juror Warner (R. 198).

Galen never went into the barroom with Mr. Warner, nor did he ever take a drink with him in the barroom or anywhere else (R. 196). On no one of the occasions when he spoke to Warner did he attempt to conceal the fact that he was speaking to him, nor did he ever speak to Mr. Warner when there were no other persons in the close vicinity. He never sought Warner out or approached him of his own accord (R. 201-202). The foregoing were the only occasions when he spoke to Warner or when Warner spoke to him (R. 189). He never introduced Warner either to Searles or to any other legislator, whether Senator or member of the House (R. 209).

His testimony as to the talk on the night of the fur sale is corroborated by Mr. Diamond, the gentleman having charge of the sale (R. 210); and testimony showing that the "whispering" to which the witness

Kirschwing testified could not possibly have taken place was given by J. A. McDonough (R. 213-220), A. M. Alderson (R. 220-224) W. C. Rae (R. 224-226), Antone Himmelbauer (R. 233-241), Charles Reibold (R. 241-244) D. C. Sweeney (R. 260-263) and Stephen Cowley (R. 248-251). Two of these witnesses were jurors, two defendants, one a spectator, and two attorneys at the trial of the Alderson case.

SPECIFICATION OF ERROR.

1. The Court erred in its conclusion that the conduct of plaintiff in error constituted misbehavior obstructing the administration of justice (R. 297).

2. The court erred in adjudging plaintiff in error to have been guilty of contempt of court (R. 14).

ARGUMENT.

The information charged that Galen and the juror drank together (R. 5). The charge failed uterly, as the Court recognizes (R. 288). Indeed, it is not too much to say that there was never any ground for making. Mr. Baldwin, the Assistant United Stataes Attorney, does, indeed, testify that both he and the United States Attorney "understood" and "believed" and "got the impression" that the witness Haven would testify that he had seen Mr. Galen and Mr. Warner drinking together in the barroom at the Placer Hotel (R. 179); but the witness Haven did not testify to this, and he made it plain that he had never told the United States Attorney anything like

this (R. 163). Again, while the United States Attorney did not take the stand, the questions addressed by him to the juror Warner (R. 104-106) imply that Warner had told him that he had taken a drink with Galen; and the witness Adkinson swore (R. 142) that in his presence Warner had admitted as much to the the United States Attorney. Warner denied both the drinking and the admission (R. 105-107); and the Court will see on reading Adkinson's cross-examination (R. 145-151) that in all probability the juror never admitted, or at least never meant to admit anything of the kind. It appears that, being quite deaf, he gave a single answer to a double question, and his answer was taken as covering both branches of the question, whereas it was meant to cover only one of them. In no other way is it possible to explain the fact that first flatly denying the drinking, he admits it freely the next instant, without a particle of explanation of the contradiction (R. 149). But, however this may be, the Government does not pretend, and, of course, could not pretend, that Adkinson's testimony, even if true, is substantive evidence of the fact that Galen and Warner drank together. It might discredit Warner, but it would not afford a shadow of ground on which to rest an independent finding of the fact which Warner is said to have admitted. The principle is elementary that impeaching testimony has no substantive or independent testimonial value; *Wigmore on Evidence,* Section 1018; and, as already stated, the court below recognizes that this charge

"fails of proof" (R. 288).

The testimony of Kirschwing has no relation whatsoever to anything charged in the information. No objection was made to its admission because counsel for Galen were disposed to give to the Government the widest latitude and the fullest opportunity to show anything that might be brought forward to his discredit. Kirschwing's story that Galen and the juror whispered together in the court room (R. 136) is negatived in the most direct way by the testimony of sworn witnesses, drawn from jurors, parties, spectators and counsel at the Alderson trial (R. 212-251) and the court below finds (R. 297) that this story is "not deemed proven beyond a reasonable doubt." That Galen and the juror spoke to each other in the corridor of the Court House on the occasion to which Kirschwing's testimony relates, was admitted, and this will be referred to later.

We say nothing of the lunch incident, or of the fact that after Warner had been subpoenaed as a witness for the Government in the contempt proceedings, Galen meeting him on the street, had sent him to his partner's office. Both incidents occurred after the trial, and could not possibly have constituted a contempt of court "during the pendency of the trial" as charged in the information, nor could they have "obstructed the administration of justice" in any way. The trial judge does not intimate that they could and, indeed, he makes it plain that there was no impropriety in directing Warner to go to Mr. Mettler's office (R.

289). However, as the lunch incident is spoken of in the opinion as "illustrative and significant" (R. 203), it is well to point out that the meeting was of the most casual character and that Galen ate at the same table with the juror only at the invitation of Mr. Lamb, one of the attorneys in the case (R. 109-111).

The charge of drinking and the Kirschwing story being both out of the way, there remains the evidence of three distinct conversations in which, if anywhere, Galen's guilt must be found; and we say three conversations, because, while Galen's testimony, going with minute detail into ever occasion, when he and the juror spoke to each other covered five such occasions, no one would pretend that the remark addressed to him the morning after the first talk (R. 191-192) or the question asked him as to the name of the legislator he had mentioned (R. 201)* would afford ground for a charge of misbehavior. The three conversations are (1) the conversation in the Hotel lobby, to which Mr. Haven testified; (2) the conversation in the Hotel lobby, to which Mr. Byrne testified; and (3) the conversation in the court room corridor, to which Mr. Kirschwing and Galen both testified.

1. According to Mr. Haven, on the evening of the day the Government closed its case (which would be on the evening of January 23), the juror Warner entered the lobby of the Placer Hotel, walked up to Galen and started talking to him (R. 163). They were right in the open; were not whispering and

rection, passed out of the witness' view behind going in the direction of the barroom (R. 163).

*Note—This question apparently was overheard by the United States Attorney (R. 99).

the conversation lasted about a minute (R. 164-165). Witness did not know what they were talking about (R. 165). They were a few feet from the steps leading up to the dining room when they first started to talk and then moved over near those steps (R. 163) and then, in the course of their movement in a westerly direction, passed out of the witness' view behind a post, going in the direction of the barroom (R. 163). This was also in the direction of the toilet room, and in the direction of the main entrance from the street; and so far as the witness knew they might have separated when they disappeared from his view, or might have gone to the toilet room or to the barroom or out on the street (R. 167).

Taken by itself, it is obvious that there is nothing in this testimony on which to ground a charge of misbehavior or contempt; but it assumes importance because of the view which the trial court has taken of it, and because of the manifest error into which that court has fallen in regard to it. Speaking of this testimony the court says: (R. 296).

> "So, on the day the prosecution rested, on a January evening, they (plaintiff in error and the juror) met in a hotel lobby, conversed in company, walked and disappeared from view where their continued journey must be either into the bar or down to a basement toilet.
>
> A private visit, conversation and journey arousing warranted suspicion in view of the circumstances, the burden shifted to Galen to

explain and no explanation was made. What their conversation, where went, how long, are still a mystery. *Not identifying, referring to or denying the incident, Galen and Warner* only said they at no time together went into the bar or drank."

*Note—This question apparently was overheard by the United States Attorney (R. 99).

We say the court has fallen into manifest error regarding this, because it says that Galen did not "identify, refer to or deny the incident;" and its is perfectly evident that this conversation, described by Haven, is the conversation which Galen describes as the one which first occurred. The two accounts differ slightly as to its commencement undeniably, Galen stating that the juror on entering the hotel approached Alderson (R. 190), whereas Haven describes him as entering the hotel and walking up to Galen (R. 163). This is a difference in detail as to which Mr. Haven might easily have been mistaken; it is less likely that Galen could have been mistaken about breaking up the conversation with Alderson; but it is not a matter of special importance which version is correct. In every other circumstance the testimony of the two witnesses is shown to cover the same conversation. Each describes it as beginning some distance from the steps leading to the dining room. Haven says they moved over near the steps (R. 165), Galen that they moved over near the balustrade of the stairway (R. 190). Haven says they disappeared behind the post (R. 167),

Galen that they went to this post at the balustrade (R. 191). Haven fixes the conversation as occurring the evening of the day the Government closed its case, on January 23 (R. 162); Galen, though uncertain as to the date, thinks it was between the 19th and 23rd of January (R. 189), which would correspond with Haven's testimony. Haven thinks the conversation occurred about six o'clock in the evening (R. 162); Galen was uncertain whether it was before or after supper (R. 192). Whether Mr. Haven was in the hotel at the time Galen did not know, but he may have been (R. 196). Haven says the conversation near the steps lasted about thirty seconds (R. 165), which would accord with Galen's statement that they separated immediately after the very short conversation which he described (R. 191).

We think anyone reading carefully the testimony of these two witnesses must agree that each refers to and describes the same conversation; but in any possible view it is clear that the court errs when it says that Galen neither identified, referred to *nor denied* the conversation which Haven described. That conversation was identical with the conversation referred to by Galen as the first conversation, or it was not. If it was, he referred to it and covered it fully. If it was not, then, unquestionably, he denied it and denied it unequivocally, for he gave in minute detail every conversation, however slight, and swore that he had those conversations *and no more.* (R. 189).

The court errs again in stating that when Galen and

the juror disappeared from view "their continued journey must be either into the bar or down to a basement toilet." Mr. Haven says that they or either of them might have been going out through the west entrance to the street (R. 167).

2. The conversation described by Mr. Byrne as occurring on the night of the fur sale (R. 49) is identified directly by Galen (R. 193-195). The two witnesses differ perhaps as to its length, Mr. Byrne describing it as a "slight conversation, lasting perhaps two or three minutes" (R. 49), while Galen's testimony would indicate that it could not have lasted that long (R. 194-195). Both agree that the juror exhibited to Galen a paper (R. 49, 194). Mr. Byrne did not know what the subject of the conversation was. His testimony is perfectly consistent with that of Galen, who says that on looking at the document, which was the bill providing for the repair in Montana of railroad cars, he handed it back to the juror with the statement that he had no time to fool with it (R. 195).

3. During a recess taken by the Court on Friday, January 26, and while Galen was standing in the Court House corridor the juror Warner approached him and said: "I want to talk to you about my bill." Galen said "For Christ's sake, wait until this trial is over." (R. 197). It was upon this exchange that the Government grounded its whole argument that Galen was guilty of contempt. We quote from the brief filed below by the United States Attorney:

"It further appears from the testimony of Mr.

Galen that he had conversations with Warner upon at least two other occasions, and that during the closing argument in the case, when a short recess was taken, the juror Warner approached Mr. Galen just outside of the court room and the following conversation was had between Mr. Galen and the juror Warner: He said, "I want to talk to you about my bill. I said to him for Christ's sake wait until this trial is over." (Tr. p. 169).

We now contend, as we contended on the oral argument, that this is an implied promise made by Mr. Galen to the juror at a moment when the trial of the case was nearly over and the final decision of the same was about to be placed in the hands of the jurors, Warner among others, of help in connection with the passage of a bill about which Warner showed much concern, and that the effect of such a promise would be to influence the mind of juror Warner in favor of those defendants in the Northwestern Trustee Company case represented by Mr. Galen, and against the government, so far as those defendants were concerned, and we take it that the making of such a promise under the conditions then existing certainly tended to obstruct the administration of justice and constituted a contempt of the authority of this court."

The trial court appears to have adopted this view

for it says, (R. 299-300):

> "It is most disturbing to remember that respondent's clients charged with felony, Warner entered the jury room and deliberated upon his verdict of acquittal with Kelly's promise *and Galen's extended hope,* at least that after the verdict, they, men of rank and influence, would grant him favors ardently desired and solicited by him."

Where, in the record, is the evidence of this extended hope to be found? Certainly not in the testimony of Haven, for he says that on the occasion when he saw Galen and the juror in conversation he did not know what they were talking about (R. 165). Certainly not in the testimony of Byrne, for he too was ignorant of the subject of their conversation (R. 49). Certainly not in the testimony of Warner, for nowhere in that testimony is there a suggestion that Galen ever extended him any hope of any character whatsoever. As the court points out (R. 293-4), neither Galen nor Warner was asked whether the former promised that he would introduce the latter to anyone; and both testified that no such introduction was ever given in fact (R. 99, 209). It must be then, that adopting the view for which the United States Attorney argued, the court finds a hope extended to the juror in this outburst of impatience; and if this is so we affirm that never was a stain placed upon a lawyer's reputation on less substantial grounds. An importunate juror, totally lacking, either through

ignorance or inexperience, in a just sense of the proprieties, is seen talking to one of the defendants on trial before him. Admonished of the impropriety of this, he asks Galen if he may talk to him; and the latter, naturally wishing to ease off an uncomfortable situation which might prove prejudicial to his client, permits him to do so. This privilege he proceeds to abuse. He thrusts his bill on Galen's attention on the night of the fur sale and is told by him that he has no time to fool with it (R. 193-194-195). He addresses him a third time on the last day of the trial with the statement "I want to talk to you about my bill:" and in the outburst which this importunity provokes,—frankly and openly discourteous and offensive as that outburst was, calculated to estrange the juror rather than to win his favor, and indeed inexcusable save as coming from a man laboring under the strain of a protracted trial,—is found the evidence of an extended hope that favors will be granted after the trial is over. If this language conveyed a hope, what language would be necessary to convey a rebuff?

The trial court says (R. 299):

> "When meetings are more or less frequent and in consequence of the known desire of the jurors, if not of counsel, are unchecked and taken advantage of, *are in part by appoint*ment, they have not the quality of casualty. The strategy of openness, the solitude of the crowd, may be safer than secretiveness, when the influence is not brazen importunity and

coarse bribery, but is only friendship and favors of courtesy."

So far as Galen is concerned no one asserts or suggests that he ever met the juror "by appointment." And while it is doubtless true that apparent openness, or absence of secretiveness in a man's conduct *may* be referable to a refined knavery, the question whether they are so in fact is, in every case, a question of fact, to be resolved like any other question of fact according to the evidence. Plaintiff in error stands charged with what the Supreme Court of the United States has said is a crime in the fullest sense. *Gompers v. United States*, 233 U. S. 604, 610. The presumption of innocence attends him. Acts fair on their face must be taken to be so in fact until they are shown to be otherwise. The trial court freely allows what of course must be allowed that "brief conversation on indifferent topics" is not to be condemned (R. 298). The conversations which the evidence discloses were all of that character. That they were brief is undeniable, for, taking the least favorable version of them, the longest lasted only two or three minutes. What their topic was we know only from the testimony of the juror and Galen which shows them to have been harmless. To discover guilt in conduct of which this is the evidence we say, with the most sincere respect and deference for the trial court, is not merely to allow conjecture to supply proof when evidence is wanting, but to allow it to overcome proof when the evidence is uncontradicted; and exoneration

of an accused is impossible on any such principles because the very ingenuousness of his conduct is taken as proof of super-craftiness, and the more triumphant is his vindication the more certain is his defeat.

In what is said so eloquently by the court below of the necessity of keeping juries free from subjection to any variety of outside influence, counsel who submit this brief unreservedly concur; nor do they wish to be understood as arguing for a relaxation in the slightest degree of the principles there set forth. It is a matter of high importance, undoubtedly, that respect for the jury system be preserved; but the principle that a man charged with crime is presumed to be innocent until he is proved to have been guilty is important too; and we think that the court below has not been sufficiently mindful of it. For eight years the official head of the bar of his state, plaintiff in error, in the prime of life and after an honorable professional career of nearly twenty years, is found guilty of having tampered with a jury empanelled to try a case in which he appeared as counsel. It is not necessary to say to any member of the court that this is a heavy charge,—so heavy as regards his future usefulness as a member of his profession that the fine imposed or any fine which might be imposed is negligible in comparison with it—and that it ought not to be allowed to stand without clear evidence to support it.

In the case of Gompers v. Buck Stove & R. Co., 221 U. S. 418, the court said:

"Without deciding what may be the rule in civil

contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself." (Citing cases).

We submit that the proof not only fails to establish the guilt of the plaintiff in error beyond a reasonable doubt, but that it does not form the basis for even a suspicion of wrongful conduct.

We have appended an analysis and discussion of the testimony which the court will find helpful.

Respectfully submitted,

W. T. PIGOTT,
Helena, Montana.
CARL RASCH,
Helena, Montana.
WILLIAM WALLACE, JR,
New York, N. Y.
L. O. EVANS,
Butte, Montana.
F. W. METTLER,
Helena, Montana.
F. C. WALKER,
Butte, Montana.
E. G. TOOMEY,
Helena, Montana.
M. S. GUNN,
Helena, Montana.

CHARLES DONNELLY,
St. Paul, Minnesota.
Attorneys for Plaintiff in Error.

W. L. MURPHY,
E. M. HALL,
O. W. McCONNELL,
J. A. POORE,
W. S. TOWNER,
T. J. WALKER,
Of Counsel for Plaintiff in Error.

APPENDIX

ANALYSIS AND DISCUSSION OF EVIDENCE.

Incident No. 1—Alleged Drinking With Juror Brown.

At the time of the immediate drinking Galen was in conversation with Rankin and the United States Attorney at one end of the bar. These three drank at a different time and by themseves. One of them paid for their drinks. Galen's relation to the drinking with Brown, which occurred further down the bar, was precisely that of the United States Attorney—he was a mere onlooker. Galen tells in detail of the incident (R. 196, 202-4), while Brown (the juror), Rankin and Cowley do the same (R. 20, 23, 25, 38, 44, 46, 252-3). None of them contradict Galen or the summary above.

The incident, itself, was harmless and somewhat unavoidable on the part of Kelly, being a mere general

invitation to a group, of which Brown happened to be a member (R. 27, 35, 252-3, 267 and 268).

Incident No. 2—Allege Drinking With the Juror Warner.

Galen says he never drank with Warner (R. 196). Warner says the same (R. 100-1-2). While there is evidence of contradictory statements of Warner in that regard (Byrne, R. 153-4-5; Adkinson, R. 142, 148-9, 151), there is not a particle of evidence that Galen ever took a drink with Warner. Assistant United States Attorney Baldwin says that the only witness whom they expected to so testify was Haven, but the later positively says he never saw or said he saw anything of the sort. He does not know how Galen or Warner separated or where they went from the post, where he last saw them. For aught he knows they may have separated there and gone out on the street. (R. 164-7).

Incident No. 3—Talks with Warner.

Galen says he had just four. He details the entire happenings on each occasion (R. 189-197). Kirschwing intrudes two talks, briefly spaced from each other, on the occasion that Galen refers to as the fourth talk. Otherwise there is no dispute as to the number of these talks.

(a) *The first talk*: Galen says Warner came up to his client Alderson in the public lobby of the Placer Hotel in the evening between January 19th and 23rd, and began a conversation. Galen went to them and stopped Warner, explaining the impropriety of

his action. The latter asked if he could speak to Galen, who said yes. They stepped over to a "post" near a "balustrade" of the stairway, where Warner spoke to him briefly about a car-repair bill then before the legislature, asking Galen if he knew any representatives who were railroad men. Galen gave him the name of Searles. With this they separated at that point. Galen did not enter the bar room (R. 189-191). Warner generally confirms the above (R. 130-131); remembers talking about the "bill," but cannot remember all details (R. 99-100). Haven says they moved over toward the "post" and talked for about a minute only. He does not know what they said (R. 163-7). No other witness refers to this talk. The hotel lobby was full of people.

The court below fell into grievous error and drew harmful conclusions therefrom by finding that neither Galen nor Warner mentioned or even identified this incident, whereas each described it, and all that was said. Warner and Galen identify it as the "first" talk (R. 131); Galen and Haven each refer to it as the talk in which Galen and Warner moved near to the "post" or "pillar" or "stairs" or "balustrade" (R. 164, 167 and 191).

The Court also erred in finding that from their position by the "post" Galen and Warner could only have gone through to the bar or the toilet. Haven, himself, admits that they might have gone to the street.

There was more excuse for charging impropriety to Ex-Supreme Court Commissioner Calloway and Mr.

McDonough, who were attorneys in the case, and who on another evening took the initiative in addressing Warner, according to Byrne (R. 50).

(b) *The second talk*: Galen says that the next morning, in Wheeler's presence and in the courtroom, Warner said to him, Galen, that he had hardly slept after that call-down Galen gave him the night before. He also asked Galen again for the name of the representative (Searles) (R. 191-2). Neither Wheeler nor anyone else contradicts or refers to this feature.

(c) *The third talk*: This occurred on the night of January 25th, in the crowded lobby of the Placer Hotel during a fur auction, which was interrupted by the arrest of the auctioneer. The latter and the furrier were talking to Galen about his defending them. At this time Warner appeared, handed Galen a roll of paper, and asked him to look it over. Glancing at it Galen found it to be a copy of a railroad bill. He told Warner he had not time to fool with it, and returned it to Warner (R. 193-5). Byrne says that Warner showed him (Galen) a typewritten documen and after a short conversation Galen handed it back and walked away (R. 49-96). Byrne did not hear what was said, but there was nothing secretive about it. The lobby was crowded (R. 54-5 and 93). They were only two feet apart when Byrne first noticed them (R. 93, 94 and 96). Diamond, the furrier, tells the same story (R. 210). There is not the least dispute about this interview.

(d) *The fourth talk*: This took place at the court-

house on January 26th, the last day of the trial, and during a five minute recess. It occurred in the open corridor in the immediate presence of all the jurors and spectators and within six feet of the main entrance to the court room. Galen was standing at an areaway, smoking and looking down the well, when Warner stepped up and started to talk again about his railroad bill. Galen, who was under severe nervous strain during the trial, reaching a climax in the argument then going on, said "for Christ's sake, wait until this trial is over." Nothing else was said (R. 197). No one contradicts this statement of Galen's.

Kirschwing, however, adds to it by saying that before the jurors went out into the corridor Warner left the box, met Galen back of the United States Attorney's chair, whispered to him and walked out into the hall followed by Galen, and that in the hall Galen had his arm around Warner's shoulder (R. 135-6). He does not say how long they talked, and agrees that it was in plain sight of all the other jurors (R. 140). No one else supports Kirschwing as to the inside "whispering." Galen and Warner deny it and also the "arm around the shoulder" feature. (R. 198). Besides two defendants, Alderson, and Rae—five other witnesses (two attorneys—Cowley and McDonough—two jurors—Riebold and Sweeney—and a spectator, Himmelbauer), testified to facts, which, if true, make it impossible that the "whispering" could have occurred (R. 235, 236, 239, 242, 243, 244, 250, 255, 248-262, 214-217, 198-200). The United States Attorney ad-

mitted that the physical arrangement of the furniture was as these witnesses said (R. 235). The Court below found these additional features were not proven beyond a reasonable doubt (R. 297). Kirschwing was actively in consultation with the United States Attorney during the trial, though the nature of his interest nowhere appears.

Incident No. 4—The Luncheon.

Warner says that on the day the jury returned their verdict he went into the general dining room. Lamb, an attorney in the case, touched him on the shoulder and asked him if he, Lamb, might sit with him. Without answering, Warner followed the waiter, who took him to a seat. Lamb came and without invitation, took a seat at the same table. Shortly after they were seated Lamb called to Judge Henry C. Smith and Kelly and Galen, who were all three then seated at an adjoining table, and asked them to come over. They did so (R. 110-111). However assembled, the gathering was so large that no improper conduct could have taken place.

According to the only affirmative, and therefore the only probative evidence in the record, Lamb was solely responsible for this fortuitous and regrettable grouping. Ex-Supreme Court Justice Henry C. Smith, himself an attorney in the Northwestern Trustee Company case, stood in precisely the same relation to this incident and was therefore equally responsible for it as Galen—that responsibility was exactly zero in the case of each.

Here we notice certain legal "camouflage" which was a pronounced feature of the conduct of the prosecution—notably observed in connection with the inquiry about this incident. The United States Attorney propounded to Warner many questions indicating that he himself was in the dining room, and that his own recollection of the happenings differed somewhat from Warner's (R. 110,111). Warner flatly denied the conversations suggested. The United States Attorney neither took the stand himself nor did he call any other witness to furnish evidence contrary to Warner's or to support the suggestions contained in the questions. These innuendos, as the Court's opinion shows, had an improper weight with the judge, for while accepting the luncheon as a fact, he yet refused to accept Warner's version of the happenings—themselves denied—and pieces out—necessarily from these questions an invitation from the defendant Bertoglio and his counsel extended to Warner in advance of entering the dining room to lunch with them, which Warner accepted (R. 294).

Incident No. 5—Galen Directing Warner to Mettler's Office.

Warner details this (R. 113). It is not referred to by any other witness. There is no evidence, the Court says, that Galen then knew that Warner had been subpoenaed, but if he did, the Court further says, and properly, there would have been no impropriety in learning that Warner was going to testify to.

The methods of private examination of witnesses

pursued by the United States Attorney are fully disclosed, and a mild criticism of them would be that they were highly improper. Especially is this the case when we find him striving by intimidation and false statements of alleged evidence available to him to force Warner to say that Galen drank with Warner (R. 58, 112, 114, 118-122, 124, 125, 132-3, 157-9, 174-180). It clearly appears that the United States Attorney was at least mistaken about having any evidence at all to that effect (R. 117-120, 121, 176, 178, 179, 180). This action on the part of the United States Attorney is much more subject to criticism since it transpired after the decision of the Supreme Court of the United States in the case of *United States v. Weeks,* 232 U. S. 383, 391, 394.

The proof wholly fails to substantiate the charge of criminal contempt contained in the information. It fails to establish beyond a reasonable doubt or at all the guilt of the defendant Galen and it affirmatively appears that his conduct was without any intent whatsoever to improperly influence the juror and was in no manner calculated or intended nor of such character as to result in influencing the juror favorably to his client. His conduct was in every particular unexceptionable and in fact perfectly proper and commendable under the circumstances.